Safri bin Koboy & Anor v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–11 OF 1998(II)
MUHAMMAD KAMIL J
3 NOVEMBER 1999

Criminal Procedure *— Appeal — Conviction and sentence, against — Error by judge in fact and law — Whether judge erred in admitting cautioned statements — Admissibility of cautioned statements — Whether judge misdirected herself at arriving at decision — Whether discrepancies in complainant's testimony sufficient to destroy credibility — Whether prosecution proved its case*

Criminal Procedure *— Appeal — Conviction and sentence, against — Accuracy of evidence — Discrepancies between oral testimony and medical report — Medical report inadmissable for non-compliance — Whether prosecution to obtain evidence through oral examination — Criminal Procedure Code s 399(i)*

Criminal Procedure *— Appeal — Conviction and sentence, against — Excessiveness of sentence imposed — Appellate court's intervention, principles governing*

The first and second appellants were jointly charged for an offence of rape punishable under s 376 of the Penal Code and read together with s 34 of the same Code. They were convicted and sentenced to an imprisonment term of ten years and one stroke of rotan. Both the appellants appealed to court citing nine grounds in support of their appeal on conviction and one ground on sentencing. Among the grounds of appeal raised were: (i) that the learned sessions court judge had erred in law and fact in admitting their cautioned statements; (ii) that of the procedure adopted to impeach the credit of the first appellant; (iii) that the learned sessions court judge had misdirected herself in allowing PW1 to be recalled under s 425 of the Criminal Procedure Code ('the CPC'); (iv) the question of accuracy of the evidence; and (v) discrepancies disclosed in the evidence of the complainant, which implied that the complainant was lying at the trial.

Held, dismissing the appeal against conviction and sentence:

(1) The learned sessions court judge had dealt with all the allegations raised by the appellants and the evidence adduced by the prosecution in the trial within a trial. There was no evidence to suggest that she had misdirected herself on the burden of proof required or applied the wrong principles of the law. There was no basis whatsoever to disturb the finding of the learned sessions court judge on the admissibility of the two cautioned statements (see pp 660I–661B).

(2) The allegation was clearly unsustainable since the first appellant was re-examined by his counsel on the same subject matter pertaining to the alleged discrepancy and given ample opportunity to explain and clarify the discrepancy. There was no hindrance posed by the trial judge to the appellants' counsel to seek the

A necessary clarifications from the first appellant and it was the said counsel's own volition to conclude the re-examination of the first appellant (see p 661E–G); *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 distinguished. The absence of a separate ruling on the factum of impeachment had in no way prejudiced the first appellant (see p 662B).

B (3) Evidently, the reprieve granted by the trial judge in allowing the prosecution to recall PW1 did not bring about any material evidence which could be said to have prejudiced the first appellant (see p 662E).

C (4) Since medical report (IDD2) had been ruled inadmissible for non-compliance of s 399(i) of the CPC, the evidence of PW5 must be viewed and considered on its own without relying on IDD2. There was no basis to allege any embellishment in the evidence of PW5 nor to even suggest a credible defect except to raise a bare allegation that PW5 probably did not even examine the complainant. The learned sessions court judge had embarked upon a careful analysis of the evidence of PW5 in order to assist her in coming to a decision and her findings therein suffered from no infirmity whatsoever (see p 663D–G); *PP v Krishnan a/l Letchumanan & Anor* [1995] 2 MLJ 690 distinguished.

E (5) Having considered the alleged discrepancies, if at all they are indeed discrepancies, most of them are reflective of the different ways in describing or remembering the events revealed in this trial. Evidence of the complainant which could not be corroborated in the material aspect must be rejected (see p 663H–I).

F (6) The appellate court should be slow in interfering with the sentence imposed by the court of first instance unless it was manifestly excessive or inadequate. Hence, it was not sufficient for the appellants' counsel merely to submit that the sentence of ten years imprisonment with one stroke of the rotan was manifestly excessive and ought to be reduced (see p 664D–E).

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[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua telah dituduh bersama untuk kesalahan merogol di bawah s 376 Kanun Keseksaan dan dibaca H bersama dengan s 34 Kanun yang sama. Mereka telah disabitkan dan dihukum untuk suatu tempoh pemenjaraan sepuluh tahun dengan satu sebatan rotan. Kedua-dua perayu telah merayu kepada mahkamah dengan menyatakan sembilan alasan untuk menyokong rayuan mereka terhadap sabitan dan satu alasan penghukuman. Antara alasan-alasan rayuan yang dibangkitkan adalah: (i) hakim I mahkamah sesyen yang arif telah silap dari segi undang-undang dan fakta di dalam menerima masuk pernyataan beramaran mereka; (ii) terhadap prosedur yang diterima pakai untuk mencabar

kebolehpercayaaan perayu pertama; (iii) bahawa hakim mahkamah sesyen yang arif telah tersalah arah dirinya sendiri di dalam membenarkan SP1 dipanggil semula di bawah s 425 Kanun Prosedur Jenayah ('KAJ'); (iv) persoalan ketepatan keterangan tersebut; dan (v) kesilapan yang dilihat di dalam keterangan pengadu, yang menyiratkan bahawa pengadu telah menipu semasa perbicaraan.

Diputuskan, menolak rayuan terhadap sabitan dan hukuman:

(1) Hakim mahkamah sesyen telah menguruskan semua pengataan-pengataan yang dibangkitkan oleh perayu-perayu dan keterangan yang dikemukakan oleh pendakwaan semasa perbicaraan di dalam perbicaraan (trial within a trial). Tiada keterangan untuk mencadangkan bahawa beliau telah tersalah arah di atas beban membukti yang diperlukan dan memakai prinsip undang-undang yang salah. Tiada dasar apa-apa sekali untuk menganggu penemuan hakim mahkamah sesyen berkenaan dengan keboleh terimaan dua pernyataan beramaran tersebut (lihat ms 660I–661B).

(2) Pengataan tersebut dengan jelas tidak boleh dipertahankan kerana perayu pertama diperiksa semula berkenaan dengan kesilapan yang dikatakan dan diberikan peluang yang luas untuk menerang dan menjelaskan kesilapan tersebut. Tiada halangan yang dikenakan oleh hakim yang membicara ke atas peguam perayu untuk memohon penjelasan yang diperlukan daripada perayu pertama dan adalah atas kerelaan peguam itu sendiri untuk menyimpulkan pemeriksaan semula oleh perayu pertama (lihat ms 661E–G); *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 dibezakan. Ketiadaan arahan yang berlainan berkenaan dengan *factum* cabaran tersebut tidak memprejudiskan perayu pertama (lihat ms 662B).

(3) Reprief yang dibenarkan oleh hakim yang membicara di dalam membenarkan pendakwaan untuk memanggil semula SP1 tidak menghasilkan sebarang keterangan material yang boleh dikatakan sebagai memprejudis perayu pertama (lihat ms 662E).

(4) Oleh kerana laporan perubatan (IDD2) telah diarah sebagai tidak boleh diterima kerana ketidakpatuhan s 399(i) KAJ, keterangan SP5 mestilah dilihat dan dipertimbangkan dengan dirinya sendiri tanpa bergantung kepada IDD2. Tiada dasar untuk mengatakan apa-apa yang berlebih-lebihan di dalam keterangan SP5 atau mencadangkan suatu kecacatan yang boleh dipercayai kecuali suatu pengataan semata-mata bahawa SP5 berkemungkinan tidak menyoal pengadu tersebut. Hakim mahkamah sesyen yang arif telah memulakan suatu analisa cermat keterangan SP5 untuk membantu beliau di dalam mencapai suatu keputusan dan penemuan-penemuannya tidak dicalar dengan sebarang kecacatan (lihat ms 663D–G); *PP v Krishnan all Letchumanan & Anor* [1995] 2 MLJ 690 dibeza.

(5) Selepas mempertimbangkan kesilapan-kesilapan yang dikatakan, jika sekalipun ia adalah kesilapan, kebanyakan daripadanya membayangkan cara-cara yang berbeza di dalam menggambarkan dan mengingat kejadian-kejadian tersebut yang didedahkan di dalam perbicaraan ini. Keterangan pengadu yang tidak boleh disokong dari segi aspek material mestilah ditolak (lihat ms 663H–I).

(6) Mahkamah Rayuan sepatutnya lambat di dalam menganggu hukuman yang dikenakan oleh mahkamah yang membicaranya, kecuali ia adalah jelas melampau atau tidak mencukupi. Oleh itu, adalah tidak mencukupi bagi peguam-peguam perayu untuk hanya menghujah bahawa hukuman sepuluh tahun penjara dengan satu sebatan rotan adalah jelas melampau dan patut dikurangkan (lihat ms 664D–E).]

Notes

For cases on appeal against conviction and sentence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 191–211.

Cases referred to

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232 (distd)
Liew Chin Yoong v PP [1971] 1 MLJ 127 (refd)
Mohamed Alias v PP [1983] 2 MLJ 172 (refd)
Muniandy & Ors v PP [1966] 1 MLJ 257 (refd)
PP v Chong Boo See [1988] 1 CLJ 679 (refd)
PP v Krishnan a/l Letchumanan & Anor [1995] 2 MLJ 690 (distd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Mohd Ali bin Abang & Ors [1994] 2 MLJ 12 (refd)
PP v Somwang Phatthanasaeng [1992] 1 SLR 138 (refd)

Legislation referred to

Criminal Procedure Code ss 399(i), 425
Penal Code ss 34, 376

Osman Ibrahim (*Osman Ibrahim & Co*) for the appellants.
Suhaimi Ibrahim (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Muhammad Kamil J: The first and second appellants herein were jointly charged for an offence of rape punishable under s 376 of the Penal Code and read together with s 34 of the same Code.

At the end of the trial, both the appellants were convicted and sentenced to an imprisonment term of ten years and also to be given one stroke of the rotan.

Being dissatisfied with the said decision, both the appellants appealed to this court citing nine grounds in support of their appeal on conviction and one ground on sentencing.

Briefly, the facts which are not in dispute indicated that on 3 August 1997 at about 6.30pm, the first appellant together with his friend, the second appellant went to see the complainant at the hostel she was staying with the intention to invite her out. Both of them went to the said hostel in two separate motorcycles. It was revealed at the trial that the first appellant knew the complainant way back in 1993 at their kampung, whereas, the second appellant was a total stranger to the complainant.

Subsequently, the complainant left the hostel together with the first appellant on his motorcycle. The second appellant accompanied them on his own motorcycle. From the hostel, the three of them proceeded to this place known as the 7th Mile where they had their dinner. At the said dinner, the second appellant was introduced to the complainant by the first appellant. After having taken their dinner, the three of them then proceeded to a house described as Quarters No 4 at Jalan Semenggok, Kuching where the alleged offence was said to have taken place.

Apparently, the quarters was empty when they reached there. The first appellant brought the complainant to the said quarters on the pretext that he wanted to take his bath. It must be noted that on his own admission, the first appellant was not staying at the said quarters at the material time of the alleged incident. In fact, the first appellant was staying somewhere at the 8th Mile and the said quarters is situated at the 12th Mile.

In their first ground of appeal, the appellants alleged that the learned sessions court judge erred in law and fact in admitting their cautioned statements. In his submission, the learned counsel for the appellants reiterated that the said cautioned statements were not given voluntarily. In furtherance thereto, it was also submitted that the appellants' cautioned statements were recorded after they had been remanded for more than six days and as such, it clearly pointed to a direction of involuntariness. On this issue, the learned counsel for the appellants also urged this court to refer to his submission made at the sessions court at p 220 of the record of appeal.

On the question of proof, this court concurs with the authority submitted by the learned counsel for the appellants in the case of *Public Prosecutor v Chong Boo See* [1988] 1 CLJ 679 where at p 687, his Lordship Edgar Joseph Jr J (as he then was) observed that:

> In considering the above questions, I recognized that the onus was on the prosecution to prove voluntariness beyond all reasonable doubt and not for the defence to prove involuntariness.

Pursuant to the abovesaid premise and considering the various allegations of assault and threat which were said to have been caused or inflicted upon the appellants, it is abundantly clear that the learned sessions court judge in her structured and comprehensive grounds of ruling on the admissibility of the two cautioned statements herein, dealt with all the allegations raised by

A the appellants and the evidence adduced by the prosecution in the trial within a trial. There was no evidence to suggest that the learned sessions court judge had misdirected herself on the burden of proof required or applied the wrong principles of the law.

This court having heard and read the submission of the learned counsel
B for the appellants at the sessions court and in this instant appeal, is of the view that there is no basis whatsoever to disturb the finding of the learned sessions court judge on the admissibility of the two cautioned statements. In coming to this decision, this court is also guided by the view expressed by Ong Hock Thye FJ in the Federal Court case of *Muniandy & Ors v PP* [1966] 1 MLJ 257 at p 258 where his Lordship held that:

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> We appreciated that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. However, in certain circumstances, it would be right and proper to do so.

D The second ground of appeal concerned the procedure adopted by the trial judge to impeach the credit of the first appellant. Essentially, the learned counsel for the appellants submitted that the first appellant was not given a chance to clarify the alleged discrepancy in his evidence and the cautioned statement. In addition thereto, the counsel also alleged that there was no separate ruling given by the learned sessions court judge when the credit of
E the first appellant was impeached as shown in p 218 of the record of appeal.

As to the allegation that the first appellant was not given a chance to clarify the alleged discrepancy, this court is of the view that the said allegation is clearly unsustainable in view of the evidence available at p 175 of the record of appeal. At that portion of the notes, it could be discerned
F that the first appellant was re-examined by his counsel on the same subject matter pertaining to the alleged discrepancy and the first appellant was given ample opportunity to explain and clarify the discrepancy as indicated therein. There was no hindrance posed by the trial judge to the learned counsel for the appellants to seek the necessary clarifications from the first appellant and it was the said counsel's own volition to conclude the re-
G examination of the first appellant. As such, the facts of the instant appeal could be easily distinguished from those in *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232.

On the question of the requirement for a separate ruling when the credit of the first appellant was impeached, it is useful to refer to the decision of
H Abdoolcader FJ in the case of *Dato Mokhtar bin Hashim & Anor v PP* at p 277 whereby the Federal Court held that:

> The procedure for impeachment should be on the lines set out in *Muthusamy v PP* [1948] MLJ 57 but we must stress that the evidence of such a witness must be considered as a whole with the rest of the evidence at the appropriate stage and that any practice which might have developed, as we are told, in the
I lower courts of making an immediate order of impeachment once a material discrepancy is discovered and no explanation is either offered or accepted, is wholly wrong and should cease immediately.

Adopting the principles as enunciated in the abovesaid case, it is crucial that a trial judge must scrutinize the whole evidence of the witness or the accused, in the context of the rest of the evidence adduced at the trial before coming to a decision as to whether to impeach the credit of the said witness or accused person. Should the credit be impeached, the trial judge must still proceed to evaluate the whole evidence of the witness or accused in order to determine which of the evidence could be accepted and which to be disregarded (see *PP v Mohd Ali bin Abang & Ors*[1994] 2 MLJ 12 and *PP v Somwang Phatthanasaeng* [1992] 1 SLR 138).

Hence, the absence of a separate ruling on the factum of impeachment had in no way prejudiced the first appellant when the learned sessions court judge before arriving at her decision to impeach the credit of the first appellant, laid down and carefully considered the evidence of the first appellant in the utmost details as shown in her written judgment (see pp 192–219 of the record of appeal). The learned sessions court judge set out the evidence of the first appellant accurately and having evaluated the first appellant's evidence with the others adduced at the trial, arrived at the findings of fact which could reasonably supported her conclusion to impeach the credit of the first appellant.

In respect of the third ground of this appeal, the learned counsel for the appellants submitted that the learned sessions court judge misdirected herself in allowing PW1 to be recalled under s 425 of the Criminal Procedure Code. In the same breath, the said counsel also submitted that the 'purported corroborated story prepared by the prosecution misfired', referring to the evidence adduced by PW1 when he was recalled. Evidently, the reprieve granted by the trial judge in allowing the prosecution to recall PW1 did not bring about any material evidence which could be said to have prejudiced the first appellant. In fact, as correctly submitted by Encik Osman Ibrahim, the 'purported corroborated story' as told by PW1 upon recall led to a rejection of part of the complaint's evidence by the trial judge as indicated in p 217 of the record of appeal as follows:

> PW1 Insp Hamizan on being recalled testified that the complainant brought along and showed him her wrist watch and a bracelet. He noticed that both were broken. However, he did not seize them.
>
> It should be noted that no reason was advanced by PW1 as to why he did not seize those items. It is also noted that PW3 who was at the police station with the complainant did not say whether she saw those items. In view of the contradiction in the complainant's own testimony about the watch and the bracelet, I am hesitant to believe and accept this allegation of the complainant.

The learned counsel for the appellants, on the next ground of appeal proceeded to question the accuracy of the evidence of PW5, the doctor who examined the complainant on 4 August 1997.

It is pertinent to note that upon the objection of the learned counsel for the appellants, the medical report (IDD2) prepared by PW5 was held by the trial judge to be inadmissible for not complying with the condition set down in s 399(i) of the Criminal Procedure Code. Apparently, the medical report was not served on the appellants ten clear days before the trial.

Hence, it is incumbent on the prosecution to obtain the necessary evidence from PW5 through oral examination of him from the witness box. Under somewhat similar scenario, Chang Min Tat J (as he then was) in *Liew Chin Yoong v PP* [1971] 1 MLJ 127 at p 128 explained as follows:

> However, as far as I could find, the report prepared by the senior chemist was never proved to have been served on the accused in accordance with section 399 Criminal Procedure Code, so as to render it admissible: see, inter alia, *Chong Peng v PP* [1954] MLJ 39 and *PP v Ng Fah* [1954] MLJ 150. This failure on the part of the prosecution was perhaps the reason why he was called as a witness. But as a witness, he did not render his report admissible merely by producing a copy of it at the trial. If his report was in the first place inadmissible because of failure to serve it within the stipulated term, it could not be made admissible by the presence of the permitted author of it. Basically, a trial is to be decided on oral evidence, except where by statutory provision, evidence could be adduced by reports or certificates in writing. Where the chemist is called by the prosecution to furnish the court with the evidence it has failed to adduce by his certificate, he must give oral evidence of his examination and findings, using his certificate, if he should find it necessary, to refresh his memory. This will have the practical effect of adducing in oral evidence what could not be admitted under s 399 of the Criminal Procedure Code.

In this instant appeal, it must be emphasized that IDD2 had been ruled inadmissible. Such being the case, the evidence of PW5 must be viewed and considered on its own without relying on IDD2. In the circumstances, there is no basis to allege any embellishment in the evidence of PW5 as the facts revealed herein are totally different from those in *PP v Krishnan a/l Letchumanan & Anor* [1995] 2 MLJ 690, because in that case, the chemist report was admitted having complied with the condition set down in s 399(i) of the Criminal Procedure Code.

As to the evidence adduced by PW5, the learned counsel for the appellants could not even suggest a credible defect except to raise a bare allegation that PW5 probably did not even examine the complainant.

Finally, having perused through the judgment of the learned sessions court judge, it is unmistakable that she embarked upon a careful analysis of the evidence of PW5 in order to assist her in coming to a decision and her findings therein suffered from no infirmity whatsoever.

Coming to the appellants' fifth ground of appeal, the learned counsel for the appellants in his submission cited a list of discrepancies disclosed in the evidence of the complainant, which would then imply that the complainant was lying at the trial. Suffice for this court to say, having considered the alleged discrepancies, if at all they are indeed discrepancies, most of them are reflective of the different ways in describing or remembering the events revealed in this trial. The learned sessions court judge had clearly demonstrated in her findings that evidence of the complainant which could not be corroborated in the material aspect must be rejected as shown in p 217 of the record of appeal, the relevant part of which I have produced earlier in this judgment. In coming to her decision, the learned sessions court judge implicitly adopted the principles

enunciated by Charles Ho J in the case of *Mohamed Alias v PP* [1983] 2 MLJ 172 as follows:

> The fact that there are discrepancies in a witness' testimony does not straight-away make him an unreliable witness and make the whole of his evidence unacceptable. It is open to the court having observed the demeanour of the witness and after careful consideration of such discrepancies to accept parts of the witness' evidence if it considers them to be true.

Ground six of the appellants' appeal is clearly incompatible with the objection raised by the learned counsel for the appellants on the admissibility of IDD2 earlier in the trial, for not complying with the condition set down in s 399(i) of the Criminal Procedure Code. Be that as it may, even on the assumption that IDD2 is to be admitted as a defence exhibit, it would not have affected the evidence of PW5 in any material way. On the other hand, IDD2 as a documentary evidence could easily corroborate the evidence of the complainant on the factum of rape.

This court is not predisposed to deal with grounds 7, 8 and 9 of the appeal herein as there are no compelling reasons proposed to show that the learned sessions court judge had misdirected herself in coming to her findings.

On the appeal against sentence, it is trite law that the appellate court should be slow in interfering with the sentence imposed by the court of first instance unless it is manifestly excessive or inadequate (see *PP v Loo Choon Fatt* [1976] 2 MLJ 256). It is not sufficient for the learned counsel for the appellants merely to submit that the sentence of ten years imprisonment with one stroke of the rotan is manifestly excessive and ought to be reduced.

Upon the foregoing reasons, the appeal against conviction and sentence by both the appellants is hereby dismissed.

Appeal dismissed.

Reported by Ezatul Zuria Azhari